Office-Supreme Court, U.S.
FILED
JUL 15 1964
JOHN F. DAVIS, CLERK

No. 636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH GERMANO, et al., *Appellants*,

v.

OTTO KERNER, as Governor of the State of Illinois and Chairman of the State Electoral Board, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

HOWARD P. ROBINSON
HOWARD J. TRIENENS
GARY L. COWAN
11 South La Salle Street
Chicago, Illinois 60603

Attorneys for Appellees Clyde Beals, David Davis, Joseph R. Mallory, William McKnight, Jr., Carl Schweinfurth, Harold B. Steele, Mrs. Faye Striebinger, and The Illinois Agricultural Association

SIDLEY, AUSTIN, BURGESS & SMITH
Of Counsel

TWENTIETH CENTURY PRESS INC., CHICAGO 60606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 636

JOSEPH GERMANO, et al., *Appellants*,

v.

OTTO KERNER, as Governor of the State of Illinois and Chairman of the State Electoral Board, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

Clyde Beals, David Davis, Joseph R. Mallory, William McKnight, Jr., Carl Schweinfurth, Harold B. Steele, Mrs. Faye Striebinger, and The Illinois Agricultural Association, appellees herein, respectfully petition pursuant to Rule 58 of the Revised Rules of this Court that rehearing be granted in this cause.

Statement

This case is an appeal from a judgment of a three-judge United States District Court for the Northern District of Illinois which sustained the existing apportionment of the State Senate of Illinois (220 F. Supp. 230). In a *per curiam* opinion announced June 22, 1964, this Court reversed the judgment below and remanded the case for further proceedings consistent with the views stated in *Reynolds* v. *Sims* (Nos. 23, 27, and 41) and the other cases relating to state legislative apportionment decided with *Reynolds* on June 15, 1964.

This Court's *per curiam* decision strikes down, in whole or in part, three sections of the Constitution of Illinois relating to legislative apportionment and the implementing statutes enacted by the Illinois General Assembly. These state constitutional provisions (Sections 6, 7, and 8 of Art. IV) cover the apportionment of both Senate and House of Representatives. The Court has disapproved the apportionment of the Senate and perhaps the method of apportionment of the House as well.

The Court made its grave and far-reaching judgment respecting Illinois legislative apportionment without permitting any defense of Illinois' interests beyond a motion to affirm filed by the appellees (defendants-intervenors in the court below) who now present this petition for rehearing. The District Court entered its judgment July 29, 1963. Appellants filed a notice of appeal fifty-seven days later, on September 24, 1963, and jurisdictional statement, motion to affirm, and appellants' brief in opposition to motion to affirm were thereafter filed in this Court, the last on January 7, 1964. Probable jurisdiction was not noted, and the case was decided without briefs or oral argument.

Reasons For Granting Rehearing

1. The decision of this Court calls for a fundamental alteration of the structure of the government of the State of Illinois. Applied to Illinois, the holding of *Reynolds* v. *Sims* that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (Slip Opinion, p. 33) means far more than a revision of the boundaries of state senatorial districts in order to equalize population. It means, rather, the destruction of a workable political compromise, adopted by the people of Illinois, through which there was an accommodation of the interests of the single

county containing a majority of the population of the state and the interests of the 101 other counties.

All Illinois, in the political sense, is divided into two parts: Cook County (Chicago and environs) and Downstate (all counties but Cook). Whether the single county of Cook (shown in black on the outline map on the following page) shall dominate the government of the entire state has been a crucial issue in Illinois politics since the population of the Chicago metropolitan area grew sufficiently large to threaten such dominance. There was no legislative reapportionment from 1901 until 1954, when the voters of the state adopted an amendment placing in the state constitution the provisions attacked in this case. The court below described the situation as follows (220 F. Supp. at 233):

> "Dissatisfaction existed and a political solution was necessary. Unlike many of its sister states, Illinois took affirmative action. A solution took the form of this Amendment and the ensuing Act, the former being ratified by 87% of the voters of metropolitan Cook County in a public referendum."

The new legislative structure, modeled on the Congress of the United States, set up a workable system of checks and balances. The House of Representatives was apportioned on the population standard, and Cook County received a majority of representatives. The Senate was apportioned on a geographic basis, and Downstate received a check on the power of Cook County. Neither area could dominate the entire state, and a reasonable balancing of interests was achieved. In 1960, at the taking of the federal census, Cook County had a population of 5,129,725—50.89 per cent of the Illinois total of 10,081,158. It had, under the 1954 reapportionment amendment, 90 of 177 state representatives and 24 of 58 state senators.

This legislative structure the Court has disapproved, thereby overturning the settlement of a difficult problem of government. Such a decision, we submit, ought not be taken without full hearing including briefs and argument. The apportionment provisions of the Illinois constitution now before this Court are part of the basic charter of government of one of the States of the Union. The issue of their validity under the Constitution of the United States merits full hearing in this Court.

2. In applying the doctrine of *Reynolds* v. *Sims* to Illinois, the Court goes far beyond anything necessary to correct the abuses of apportionment of state legislatures found in Alabama, or in Tennessee (*cf. Baker* v. *Carr*), or in the bulk of the reapportionment cases considered by this Court. It is one thing to open the jurisdiction of the federal courts to consideration of the validity of apportionment of state legislatures under the traditional standards of the Equal Protection Clause. This is sufficient to condemn apportionments having no rational basis or designed to preserve minority control of the legislative process. But it is quite a different thing to read the Fourteenth Amendment as prohibiting a state from choosing as the basis of its governmental structure the very system of checks and balances employed in the Federal Constitution and under which the minority cannot control the majority. This most important aspect of this Court's decision in the reapportionment cases should be separately reconsidered by this Court in its most extreme application to Illinois.

Numerous bills and joint resolutions have already been introduced in Congress to limit the jurisdiction of the federal courts or to amend the Constitution to provide that there be no limitation on the power of the states to apportion their legislatures. Before such extreme counter-measures are considered by Congress, with the resulting threat to the

integrity of this Court as an institution, it is respectfully submitted that this Court should reconsider that part of the doctrine announced in *Reynolds* v. *Sims* which goes far beyond the facts of that case and has its most extreme application in the Court's judgment of reversal in this Illinois case.

3. The controlling facts in this Illinois case—a single county with a majority of the population of the state and a legislature with one house apportioned by population—were not present in any of the reapportionment cases to which the Court gave full hearing. Of the six states from which these cases came, only Colorado had one house of its legislature apportioned by population, and the (1960) population of the most populous county of Colorado was but 28.16 per cent of the total for the state. Consequently, Illinois' legislative structure has been invalidated without full hearing either in this Illinois case or any other case presenting the same issues.

4. Underlying this Court's decision in *Reynolds* v. *Sims* is the proposition that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." (Slip Opinion, p. 33.) In Illinois, there is a factor in any realistic comparison of the weight of a vote in Cook County with the weight of a vote Downstate which the Court did not consider in any of its opinions on state legislative apportionment.

This factor consists of the political strength Cook County voters derive from the common interests, organization, and leadership to which concentration of population has given rise. The weight of an individual vote in the government of a state is negligible; voters influence legislation when

significant numbers have common aims that their representatives can identify and must respond to. This Court expressly recognized the power of Cook County when, in *MacDougall* v. *Green*, 335 U.S. 281, 284 (1948), it distinguished between "thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." Whatever the relevance of the *MacDougall* decision to the political circumstances of other states, cf. *Reynolds* v. *Sims* (Slip Opinion, pp. 26, 29), the "practical opportunities" of Cook County voters "for exerting their political weight at the polls" still exist in Illinois. The continuing applicability of the *MacDougall* case to the state where it arose presents, we submit, an issue worthy of briefing and argument before this Court prior to any decision that overrules *MacDougall sub silentio* and strikes down the fundamental basis of the governmental structure of Illinois.

5. Furthermore, the scope of this Court's decision in the instant case is not clear. Only the apportionment of the Illinois Senate was at issue in the court below, and that court found, without dispute by any party, that "Illinois provides for the election of the members of one house, in this case the lower house, on the basis of population." (220 F. Supp. at 232.) This Court stated in the Maryland case, however, that the "indispensable subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes* (Slip Opinion, p. 16). It then found that the Maryland House of Delegates was not in fact apportioned on a population basis, and that, in any event, "gross disparities" in apportionment of the Maryland Senate voided the state's entire scheme of legislative representation. *Ibid.*

The *per curiam* decision in the instant case gives no indication of what the reversal of the judgment below implies as to the apportionment of the Illinois House of Representatives. It cannot be ascertained whether the Court's judgment overrules the finding below that the method of apportionment of the Illinois House of Representatives is satisfactory or, if it does not, whether the Court found "gross disparities" in Senate apportionment that nonetheless invalidate House apportionment. These are questions, we submit, that deserve consideration and clarification in this Court upon briefs and argument.

CONCLUSION

For the foregoing reasons, rehearing should be granted and this case set down for briefs and oral argument.

Respectfully submitted,

HOWARD P. ROBINSON
HOWARD J. TRIENENS
GARY L. COWAN
11 South La Salle Street
Chicago, Illinois 60603

Attorneys for Appellees Clyde Beals, David Davis, Joseph R. Mallory, William McKnight, Jr., Carl Schweinfurth, Harold B. Steele, Mrs. Faye Striebinger, and The Illinois Agricultural Association

SIDLEY, AUSTIN, BURGESS & SMITH
Of Counsel

July, 1964.

Certificate of Counsel

I hereby certify, pursuant to Rule 58(1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

HOWARD J. TRIENENS
Counsel for Petitioners